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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HELENE HASSO,

Plaintiff and Respondent,

v.

MAY HASSO,

Defendant and Appellant.

G039911

(Super. Ct. No. A182042)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gerald G. Johnston, Judge. Affirmed.

Paul, Hastings, Janofsky & Walker, Glenn D. Dasso, Paul W. Cane, and Jinhee Kim for Defendant and Appellant.

Latham & Watkins, Jon D. Anderson, Kristine L. Wilkes, and Michael W. De Vries for Plaintiff and Respondent.

Appellant May Hasso (May) appeals from an order denying her anti-SLAPP motion¹ to strike respondent Helene Hasso's (Helene) first amended probate petition.² The court correctly denied the motion because Helene's petition arises from May's alleged failure as a trustee to distribute trust income to her. This conduct is not protected by the anti-SLAPP statute. Helene's petition does not arise from May's protected act of petitioning for instructions about the alleged trust income. We affirm.

FACTS

Helene filed a probate petition in April 2004 containing the following allegations. Helene is the surviving spouse of Norman E. Hasso and the lifetime income beneficiary of a trust he had created.³ The remainder beneficiaries are Norman and Helene's children, Heather and Ronald. The trustee is May, who is Norman's sister. May considers the trust income to belong to the Hasso family, not an "outsider" like Helene. May thus tries to avoid distributing income to Helene, and instead works to maximize the amount of trust assets that will eventually flow to Heather and Ronald.

Helene alleged May, as trustee, breached the duty she owed to Helene as a beneficiary. May failed to distribute trust income to Helene, wrongly characterized income as principal, denied Helene's requests for information and failed to provide an

¹ We respectfully adopt the parties' use of first names for clarity.

² "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1; see Code Civ. Proc., § 425.16.) All further statutory references are to the Code of Civil Procedure unless otherwise stated.

³ More particularly, Norman created the Norman E. Hasso 1993 Trust, which was divided when he died into the "Exemption Trust" and the "Marital Trust." The Marital Trust was itself divided, and now comprises two subtrusts. These subtrusts are the "trust" at issue here.

accounting, and generally acted adversely to Helene. May defrauded Helene into quitclaiming her interest in her and Norman's Newport Beach luxury home, and sold the interest for \$1,125,000. May then denied Helene's request for a distribution of trust income to buy a new home. She used trust assets to repay purported loans to the trust from herself and her relatives and paid herself extravagant fees of up to \$12,000 per month. May also looted, then abandoned, a company (Gulfstream Retirement) of which she was the president and sole director and of which Helene was the sole shareholder.

Helene sought to remove May and appoint a new trustee. She also sought to reduce or deny May's compensation, require May to provide an accounting, recover compensatory and punitive damages, enjoin May from committing further breaches, set aside acts committed in breach of trust, impose an equitable lien or constructive trust on all trust assets, trace and recover wrongfully transferred trust property, convert underproductive trust assets to income-producing property, properly allocate between trust income and principal, and obtain a distribution of all trust income to her.

Helene repeated most of these allegations verbatim in a first amended petition (FAP) filed in November 2007. A few of the initial allegations were reworded in the FAP and some were deleted altogether, such as the allegations about Gulfstream Retirement. The prayer for relief in the FAP was substantially the same as the prayer in the initial petition.

But the FAP contained new allegations concerning May's failure to treat two cash distributions to the trust (the Holiday distributions) as income. First, Holiday Retirement Corporation (Holiday) distributed cash to the trust in 2003. May wrongly characterized the cash as trust principal, not income. May refused to distribute the cash to Helene after the trial court found the cash was trust income. She continued to withhold the cash even after the appellate court affirmed the trial court order. May finally distributed the cash to Helene only after the California Supreme Court denied review. Second, Holiday distributed over \$3 million to the trust in March 2006. May did not

distribute this cash to Helene as trust income. She instead petitioned the court for instructions, without any good faith argument for concluding the cash was principal.

May filed an anti-SLAPP motion to strike the petition. She also asked the court to take judicial notice of petitions for instructions she had filed in 2004 and 2006 regarding the Holiday distributions. The court granted the request for judicial notice but denied the anti-SLAPP motion. It stated in its minute order, “most of the allegations [in the FAP] are unrelated to May Hasso’s right to petition. [T]he few allegations which involve May’s right to petition are ‘merely incidental’ to the cause of action.”

DISCUSSION

The order denying May’s anti-SLAPP motion to strike Helene’s FAP is directly appealable. (§ 425.16, subd. (i).) It is subject to our independent review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

The Anti-SLAPP Statute

The anti-SLAPP statute “‘is designed to protect citizens in the exercise of their First Amendment constitutional rights of free speech and petition. It is California’s response to the problems created by meritless lawsuits brought to harass those who have exercised these rights.’” (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 273.) It provides, “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike.” (§ 425.16, subd. (b)(1).)

May bears the initial burden of establishing the FAP arises from protected free speech or petitioning activity. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89

(*Navellier*).)⁴ She focuses upon the Holiday distribution allegations. She contends these allegations arise from her act of filing petitions for instructions with the court to determine whether the Holiday distributions constitute trust income or principal. The parties concede the acts of filing the petitions are protected activity. (See *id.* at p. 90 [anti-SLAPP statute protects filing suit]; see also § 425.16, subd. (e)(1) [protecting “any written . . . statement or writing made before a . . . judicial proceeding].)

The issue is whether the FAP arises from May’s filing the petitions for instructions. “[T]he statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*Cotati*).) “In the anti-SLAPP context, the critical point is whether the plaintiff’s cause of action itself was *based on* an act in furtherance of the defendant’s right of petition or free speech.” (*Ibid.*) The focus must be “on the substance of [the] lawsuit,” not on the plaintiff’s “litigation tactics” (*id.* at p. 78) or “subjective intent.” (*Id.* at p. 74.) The court used a “but for” analysis in *Navellier* to determine whether a cause of action was based on protected petitioning activity; “but for the federal lawsuit and [the defendant’s] alleged actions taken in connection with that litigation, plaintiffs’ present claims would have no basis.” (*Navellier, supra*, 29 Cal.4th at p. 90.)

When a cause of action is based both on protected and unprotected activity, no single allegation may take disproportional weight. When analyzing a “mixed” cause of action, it is “the *principal thrust* or *gravamen* of the plaintiff’s cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based

⁴ If May had met her burden, Helene would then bear the burden to “establish[] that there is a probability that [she] will prevail on the claim.” (§ 425.16, subd. (b)(1).) May did not meet her initial burden for the reasons stated *post*; thus, we need not decide whether Helene met her burden.

essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.” (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188 (*Martinez*).) Conversely, when allegations of protected activity are neither incidental nor collateral, “a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one ‘cause of action.’” (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308.)

The FAP Arises from May’s Unprotected Conduct, Not Her Petitioning Activity

May contends she met her burden of showing the FAP arises from protected activity. She claims the court wrongly treated the FAP as presenting a single cause of action, to which the allegations concerning her petitions for instructions were “merely incidental.” She maintains each act allegedly committed in breach of her duties to Helene supports its own cause of action. (See *Ormerod v. Security-First Nat. Bank* (1937) 21 Cal.App.2d 362.) May claims the FAP, when properly analyzed, asserts two causes of action based solely on her petitions for instructions.

May correctly looks to the FAP’s substance to determine its causes of action, but her conclusion still fails. The FAP may arguably be read narrowly as containing distinct causes of action for “breach of duty to distribute Holiday Europe cash” and “breach of duty to distribute March 2006 Holiday cash,” but no more narrowly than that. Even reading the FAP this narrowly, these causes of action would be based on May’s alleged wrongful characterization of the Holiday distributions as trust principal and her alleged failure to distribute them as trust income to Helene. These would be the acts “underlying” the causes of action. (*Cotati, supra*, 29 Cal.4th at p. 78.) May’s bare failure to pay Helene, in and of itself, is not protected activity.

Even under May’s reading of the FAP, this is a case like *Cotati*. There, the court held a declaratory relief action arose from the parties’ underlying dispute, not from

the defendants' pending declaratory relief action in federal court regarding the same dispute (even though the federal court action precipitated the *Cotati* action by motivating the plaintiff to forum shop). (*Cotati, supra*, 29 Cal.4th at pp. 74, 79-80.) Similarly here, the narrowly-read FAP did not arise from the petitions for instructions, even though they preceded the FAP and addressed the same general issue. And it is wholly irrelevant whether Helene amended her initial petition and filed the FAP "in response to, or in retaliation for," May's petitions for instructions. (*Id.* at p. 78.) The FAP arose from the underlying alleged failures by May to distribute trust income to Helene, not May's later attempts to obtain judicial approval.⁵

This is not a case like *Navellier*. There, the court held the complaint arose from protected activity because the plaintiff claimed the defendant breached an agreement not to sue by the very act of filing counterclaims against the plaintiff in federal court.⁶ (*Navellier, supra*, 29 Cal.4th at p. 90.) Thus, the complaint survived a "but for" analysis. (*Ibid.*) Here, in contrast, the FAP may expressly refer to one petition for instructions and allude to another, but it does not allege May breached any duty by the very acts of filing the petitions. The FAP fails a "but for" analysis. Helene would state just as viable a claim based upon May's failure to distribute the Holiday distributions to her, even if May had never filed her petitions for instructions.

A telling comparison can be made to a case May cites, *Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347 (*Philipson*). There, a client initiated fee

⁵ (See also *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 732 [complaint not subject to anti-SLAPP statute where based upon lawyer's representation of adverse party, not lawyer's litigation conduct]; *Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 161-162 [complaint not subject to anti-SLAPP statute where based on wrongful lease termination, not landlord's filing of statutory notices].)

⁶ (See also *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 673 [complaint subject to anti-SLAPP motion where the plaintiff alleged the defendant law firm breached fiduciary duties by the very acts of taking certain litigation positions].)

arbitration because his lawyers retained \$15,000 in settlement funds for their fees, pursuant to the settlement agreement. (*Id.* at pp. 352-253.) In later litigation regarding the settlement, the law firm brought a cross-complaint against its (now former) client, alleging the client breached the retainer agreement by refusing to allow it to keep its fees. (*Id.* at p. 355.) The court held the firm’s claim was subject to an anti-SLAPP motion because it was based on the client’s protected act of commencing fee arbitration. (*Id.* at pp. 360-361.) It embraced the client’s contention that her bare refusal to pay would have been unprotected if “she was ever in possession of the disputed \$15,000.” (*Id.* at p. 360.) But because the client had never received the settlement amount allocated to legal fees, “she could not ‘refuse’ to pay it other than” by initiating arbitration, and so the firm’s claim arose from that protected activity. (*Id.* at p. 361.)

The FAP presents the flipside of *Philipson*. Unlike the firm there, Helene alleges that May failed to distribute to her Holiday cash already in the trust’s possession. This is an unprotected failure to pay, just like the *Philipson* client’s failure to pay attorney fees would have been unprotected if she had possessed the disputed funds. (*Philipson*, *supra*, 154 Cal.App.4th at pp. 360-361.) *Philipson* would suggest a different outcome if Helene had sued May before the trust had received the Holiday distributions, and alleged May had breached her duties by the bare act of filing petitions for instructions concerning Holiday. If that were the case, the FAP would arise out of May’s protected petitioning activity, just like the *Philipson* cross-complaint arose from the client’s fee arbitration. (*Id.* at p. 361.) But the FAP alleges the trust had already received the Holiday distributions — facts conceded in May’s petitions for instructions, which the court judicially noticed in deciding her anti-SLAPP motion. Because the trust already had the Holiday distributions, the FAP alleges nothing more than a simple, unprotected failure to pay.

May also misses the mark in her alternative contention that even if the FAP presents a single mixed cause of action, its allegations of protected conduct are more than

incidental. Whether the FAP is read to contain one or one hundred causes of action, none is “*based on*” May’s petitioning for instructions or any other protected activity. (*Cotati, supra*, 29 Cal.4th at p. 78.) Even causes of action regarding only Holiday distributions would be based solely on May’s alleged, unprotected acts of mischaracterizing the distributions and withholding them from Helene. And if the FAP did present a mixed cause of action, its “*principal thrust or gravamen*” would still be May’s failure to distribute the Holiday distributions to Helene. (*Martinez, supra*, 113 Cal.App.4th at p. 188.) The FAP’s references to May’s subsequent petitions for instructions are “incidental . . . collateral allusions to protected activity” that do not implicate the anti-SLAPP statute.⁷ (*Ibid.*)

DISPOSITION

The order is affirmed. Helene shall recover her costs on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.

⁷ May’s motion to augment the record with the transcript of a hearing that took place nearly two months *after* the court denied her anti-SLAPP motion is denied.